

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JASON ALLEN MAGGARD,

Petitioner, No. CIV S-04-2196 GEB KJM P

vs.

JEANNE S. WOODFORD, et al.,

Respondents. FINDINGS AND RECOMMENDATIONS

Petitioner is a state prison inmate proceeding pro se with a petition for a writ of habeas corpus under 28 U.S.C. § 2254, challenging his Placer County convictions for evading an officer while driving in disregard for safety and assault with a deadly weapon. He raises two grounds: the trial court erred in allowing a police officer to describe some of petitioner's actions as volitional, and the trial court erred in failing to give a specific unanimity instruction.

I. Factual and Procedural Background

The state Court of Appeal's recitation of the facts of the offense fairly reflects the record:

On July 22, 2000, Sacramento Police Officer Richard Baughman was traveling on Auburn-Folsom Road, near its intersection with Horseshoe Bar Road. He was on a marked police motorcycle and in full uniform.

1 Baughman noticed a line of stopped vehicles northbound on
2 Auburn-Folsom Road, which were waiting for three children,
3 ranging in ages six through nine, to cross the street. In his
peripheral vision, Baughman saw another vehicle, which was
moving very fast, approaching the stopped vehicles.

4 Officer Baughman saw that the vehicle was a white Chevrolet
5 pickup truck, traveling at perhaps 75 miles per hour (mph). As it
6 approached the stopped traffic, the truck crossed over the double
7 yellow line into the oncoming (southbound) lane. Baughman
8 yelled as loudly as he could for the children to stop. The children
responded by stopping in the middle of the street. The officer then
made eye contact with defendant, who was driving the white
pickup. Defendant's truck accelerated as it raced passed [sic] the
children, missing them by about five feet.

9 Baughman activated his siren and high-beam headlights and began
10 a high speed pursuit of defendant northbound on Auburn-Folsom
11 Road, reaching speeds close to 100 mph. Near the intersection of
12 Whiskey Bar Road, defendant's truck abruptly shifted its weight
13 and swerved to the left across the center line, narrowly missing a
14 southbound vehicle and forcing it off the road to the bottom of an
embankment. Near the intersection of King Road, defendant again
crossed the center line, narrowly missing a southbound vehicle and
also forcing it off the road. Except when he drove passed [sic] the
children and veered toward each of the two oncoming vehicles,
defendant stayed in his lane of traffic and did not cross the center
line.

15 As defendant approached a sweeping curve near Kingmont Road,
16 the truck's wheels locked and it skidded off the road, coming to
17 rest against a wooden rail fence. The occupants promptly began
18 throwing beer bottles out of the truck. With the assistance of two
backup officers, Baughman took defendant and his two passengers
into custody.

19 At the time of his arrest, defendant had two outstanding felony
20 bench warrants for failure to complete his work project.

21 Lodged Document D, Appendix A (Lodg. Doc., App.) at 1-3.

22 In the state Court of Appeal, petitioner raised six challenges to his conviction.

23 Lodg. Doc. A. His Petition for Review filed in the California Supreme Court contained only two
24 issues. Lodg. Doc. D.

25 Petitioner's original petition in this court was dismissed because petitioner named
26 the wrong respondent. See Docket No. 4. His amended petition contained the six claims

1 presented to the state Court of Appeal; the court recommended that the petition be dismissed
2 because it contained both exhausted and unexhausted claims. Docket No. 18. The district court
3 declined to adopt the recommendations and returned the case to this court for consideration in
4 light of Rhines v. Weber, 544 U.S. 269 (2005). Docket No. 21. Ultimately, however, this court
5 recommended that petitioner's motion for a stay of the proceedings to permit exhaustion of the
6 remaining claims be denied, a recommendation upheld by the district court. Docket Nos. 25, 29.
7 The case has proceeded on the two exhausted claims.

8 **II. Standards Under The AEDPA**

9 An application for a writ of habeas corpus by a person in custody under a
10 judgment of a state court can be granted only for violations of the Constitution or laws of the
11 United States. 28 U.S.C. § 2254(a). Federal habeas corpus relief also is not available for any
12 claim decided on the merits in state court proceedings unless the state court's adjudication of the
13 claim:

14 (1) resulted in a decision that was contrary to, or involved an
15 unreasonable application of, clearly established federal law, as
determined by the Supreme Court of the United States; or

16 (2) resulted in a decision that was based on an unreasonable
determination of the facts in light of the evidence presented in the
17 State court proceeding.

18 28 U.S.C. § 2254(d) (referenced herein in as “§ 2254(d)” or “AEDPA”). See Ramirez v. Castro,
19 365 F.3d 755, 773-75 (9th Cir. 2004) (Ninth Circuit affirmed lower court's grant of habeas relief
20 under 28 U.S.C. § 2254 after determining that petitioner was in custody in violation of his Eighth
21 Amendment rights and that § 2254(d) does not preclude relief); see also Lockyer v. Andrade, 538
22 U.S. 63, 70-71 (2003) (Supreme Court found relief precluded under § 2254(d) and therefore did
23 not address the merits of petitioner's Eighth Amendment claim).¹ Courts are not required to

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25 ¹ In Bell v. Jarvis, 236 F.3d 149, 162 (4th Cir. 2000), the Fourth Circuit Court of Appeals
held in a § 2254 action that “any independent opinions we offer on the merits of constitutional
claims will have no determinative effect in the case before us . . . At best, it is constitutional
dicta.” However, to the extent Bell stands for the proposition that a § 2254 petitioner may obtain

1 address the merits of a particular claim, but may simply deny a habeas application on the ground
2 that relief is precluded by 28 U.S.C. § 2254(d). Lockyer, 538 U.S. at 71 (overruling Van Tran v.
3 Lindsey, 212 F.3d 1143, 1154-55 (9th Cir. 2000) in which the Ninth Circuit required district
4 courts to review state court decisions for error before determining whether relief is precluded by
5 § 2254(d)). It is the habeas petitioner's burden to show he is not precluded from obtaining relief
6 by § 2254(d). See Woodford v. Visciotti, 537 U.S. 19, 25 (2002).

7 The "contrary to" and "unreasonable application" clauses of § 2254(d)(1) are
8 different. As the Supreme Court has explained:

9 A federal habeas court may issue the writ under the "contrary to" clause if the state court applies a rule different from the governing
10 law set forth in our cases, or if it decides a case differently than we have done on a set of materially indistinguishable facts. The court
11 may grant relief under the "unreasonable application" clause if the state court correctly identifies the governing legal principle from
12 our decisions but unreasonably applies it to the facts of the particular case. The focus of the latter inquiry is on whether the state court's application of clearly established federal law is
13 objectively unreasonable, and we stressed in Williams [v. Taylor, 529 U.S. 362 (2000)] that an unreasonable application is different
14 from an incorrect one.

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16 Bell v. Cone, 535 U.S. 685, 694 (2002). A state court does not apply a rule different from the
17 law set forth in Supreme Court cases, or unreasonably apply such law, if the state court simply
18 fails to cite or fails to indicate an awareness of federal law. Early v. Packer, 537 U.S. 3, 8
19 (2002).

20 The court will look to the last reasoned state court decision in determining
21 whether the law applied to a particular claim by the state courts was contrary to the law set forth
22 in the cases of the United States Supreme Court or whether an unreasonable application of such
23 law has occurred. Avila v. Galaza, 297 F.3d 911, 918 (9th Cir. 2002). Where the state court fails

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25 relief simply by showing that § 2254(d) does not preclude his claim, this court disagrees. Title
26 28 U.S.C. § 2254(a) still requires that a habeas petitioner show that he is in custody in violation
of the Constitution before he or she may obtain habeas relief. See Lockyer, 538 U.S. at 70-71;
Ramirez, 365 F.3d at 773-75.

1 to give any reasoning whatsoever in support of the denial of a claim arising under Constitutional
2 or federal law, the Ninth Circuit has held that this court must perform an independent review of
3 the record to ascertain whether the state court decision was objectively unreasonable. Himes v.
4 Thompson, 336 F.3d 848, 853 (9th Cir. 2003). In other words, the court assumes the state court
5 applied the correct law, and analyzes whether the decision of the state court was based on an
6 objectively unreasonable application of that law.

7 It is appropriate to look to lower federal court decisions to determine what law has
8 been "clearly established" by the Supreme Court and the reasonableness of a particular
9 application of that law. See Duhaime v. Ducharme, 200 F.3d 597, 598 (9th Cir. 1999).

10 III. Baughman's Testimony

11 On August 29, 2001, the defense filed a motion in limine, seeking to exclude
12 Baughman's testimony that petitioner intentionally steered the truck toward two cars, intended
13 that the two cars collide with fixed objects, and intended to cause an accident so that Baughman
14 would stop to assist any one injured. CT 111-112.

15 The trial court held a hearing on the motions in limine and heard Baughman's
16 testimony. RT 54-65. It ruled that Baughman had "sufficient expertise into the characteristics of
17 vehicles at high speed maneuvering and as to the behavior of those being pursued in high speed
18 chases he would qualify as an expert on those." The court also found that this information was
19 outside the experience of the average juror, so that expert testimony would aid the trier of fact.
20 RT 65-66.

21 Thereafter, Baughman testified that although petitioner swerved several times
22 during the pursuit, he did not lose control of the truck and that the movements were intentional.
23 RT 131, 139, 183. He also testified that some of petitioner's maneuvers appeared to be an
24 attempt to run oncoming cars off the road. RT 129.

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1 The Court of Appeal rejected this claim of error:

2 The [trial] court did not abuse its discretion in qualifying
3 Baughman as an expert on whether defendant's turning movement
4 into oncoming vehicles was intentional. Baughman had extensive
5 experience as a traffic officer; he had special training on accident
6 reconstruction and had personally been involved in over 100 high-
7 speed chases. His opinion that defendant's swerving movement
8 was volitional was based on technical observations not within the
9 capability of the ordinary layperson, such as the condition of the
10 tires and the roadway, the slack in the steering, and the change in
11 the loading and suspension of [the] swerving vehicle.

12 Contrary to defendant's suggestion, Baughman was not testifying
13 as to defendant's state of mind. The officer was simply applying
14 his experience and observations to give an opinion as to whether
15 the turning movement of defendant's truck was caused by the
16 volitional action of the driver rather than by external factors such
17 as skidding or loss of control. Baughman was not asked for, nor
18 did he give, an opinion on the speculative subject of defendant's
19 thought processes during the high-speed chase.

20 Defendant also claims it was improper for the officer to opine that,
21 with respect to the first vehicle, defendant's movement was an
22 "attempt to run [it] off the road," an opinion partially based on his
23 experience that fleeing suspects sometimes use such diversionary
24 tactics to avoid capture. He asserts that Baughman was unqualified
25 to give such an opinion, because it was derived solely from
26 conversations with unidentified suspects, not on any scientifically
reliable data.

It appears that Baughman's testimony that defendant attempted to run one of the vehicles off the road strayed beyond the permissible scope of the court's ruling on the motion in limine. The court made clear that Baughman was qualified to express an opinion on whether "the maneuver by [defendant] was caused by some external force or was volitional on his part," and could testify concerning the "behavior of those being pursued in high speed chases." Nevertheless, all parties agreed that Baughman would not be asked whether defendant "intended to turn into oncoming vehicles." To the extent that Baughman exceeded the scope of the court's in limine ruling, however, defendant waived any claim of error by failing to object and move to strike the remark.

In any event, Baughman's opinion that defendant was attempting to run one of the vehicles off the road did not constitute prejudicial error. The evidence was clear that defendant was driving erratically and at exceptionally high speeds while attempting to flee from a uniformed motorcycle officer. The only time he crossed the center line was to swerve at oncoming vehicles. Even without Baughman's opinion, the jury could easily conclude that defendant

intentionally steered his truck toward oncoming traffic in an attempt to create a diversion that would facilitate his escape. It was miraculous that no one was killed or seriously injured as a result of defendant's reckless driving. We conclude the jury would have returned the same verdict with or without Baughman's remark.

Lodg. Doc. at 6-8.

Generally, a state court's evidentiary ruling is not subject to federal habeas review unless the ruling violates federal law, either by infringing upon a specific federal constitutional or statutory provision or by depriving the defendant of the fundamentally fair trial guaranteed by due process. See Pulley v. Harris, 465 U.S. 37, 41 (1984); Jammal v. Van de Kamp, 926 F.2d 918, 919-20 (9th Cir. 1991). Petitioner does not argue that the admission of this testimony violated a specific constitutional provision, but rather that it rendered his trial fundamentally unfair.

This court cannot say that the state court acted unreasonably in rejecting this claim of error: neither Baughman's opinion that petitioner was in control of the vehicle when it swerved at the other cars or his testimony that petitioner was attempting to cause an accident in order to short-circuit the pursuit rendered petitioner's trial fundamentally unfair. Baughman's purely factual description of petitioner's driving provided the following information for the jury: a number of cars were stopped at an intersection in both the direct lane of travel and the left turn lane, to allow some children to cross the street, RT 94, 96; petitioner approached the intersection at a speed of 75 miles per hour, although the posted speed for that portion of Auburn-Folsom Road was 45 miles per hour, RT 95, 111; instead of stopping behind the other cars, petitioner crossed the double yellow line into the opposite lane to bypass the stopped cars and pass through the intersection, RT 97; petitioner accelerated through the intersection, coming to within five feet from the children, RT 98, 100; Baughman, in uniform, made eye contact with petitioner, who looked startled, RT 99; Baughman activated the lights and siren on his motorcycle, but petitioner did not stop, RT 99, 112; Baughman began a pursuit, sounding his air horn on occasion and

1 though petitioner did slow down to about 65 miles per hour to take a curve, he did not stop,
2 RT 115-117; when the road became straighter, petitioner exceeded 70 miles per hour again, RT
3 122; petitioner crossed the double yellow line into oncoming traffic, missing an oncoming
4 vehicle by about five feet and causing it to veer off the road, RT 122-124; petitioner again slowed
5 to about 65 miles per hour on curves, accelerating to 90 miles per hour on the straightaway and
6 had no problem staying in his lane, RT 126; petitioner crossed the double yellow line a second
7 time, again causing an oncoming car to veer off the road, RT 127-128, 136; there were no
8 obstructions or hazards in petitioner's direction of travel when he crossed the double yellow line
9 on these two occasions, RT 128, 141; eventually, petitioner's wheels locked as he braked for a
10 curve and he skidded off the road and into a fence, RT 145. Baughman's two opinions—that
11 petitioner did not lose control of the truck when he crossed the double yellow line and that these
12 movements were attempts to force the oncoming vehicles off the road—did not render the trial
13 fundamentally unfair in light of the overwhelming evidence of petitioner's reckless driving and
14 traffic violations.²

15 In addition, the jury was instructed that it was “not bound by an [expert’s]
16 opinion. Give each opinion the weight you think it deserves. You may disregard any opinion if
17 you find it to be unreasonable.” RT 291; CT 165. Compare Engesser v. Dooley, 457 F.3d 731
18 (8th Cir. 2006) (even though officer opined that petitioner was lying when he gave his statement,
19 error was harmless because jury was instructed it was sole judge of credibility). The Court of
20 Appeal did not apply constitutional law in an unreasonable fashion in rejecting this claim.

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22 2 The Court of Appeal found that petitioner did not preserve his objection to Baughman's
23 opinion that petitioner was attempting to force the other cars off the road. Lodg. Doc. D, App. A
24 at 7. Respondent argues that this claim is thus procedurally defaulted. This court chooses not to
25 address the question of default, but rather resolves the claim on its merits. See Lambrix v.
26 Singletary, 520 U.S. 518, 525 (1997) (a district court may reach the merits of a habeas
petitioner's claim where, as here, the merits are “easily resolvable against the petitioner whereas
the procedural-bar issue involve[s] complicated issues of state law.”).

1 IV. Unanimity Instruction

2 Petitioner was convicted of violating California Vehicle Code section 2800.2,
3 which makes a driver's willful and wanton disregard for the safety of persons or property while
4 fleeing a police officer a felony. Subdivision (b) of this code section provides:

5 For purposes of this section, a willful or wanton disregard for the
6 safety of persons or property includes, but is not limited to, driving
7 while fleeing or attempting to elude a pursuing peace officer during
8 which time either three or more violations that are assigned a
9 traffic violation point count under Section 12810³ occur, or damage
10 to property occurs.

11 Cal. Veh. Code § 2800.2(b).

12 The trial court instructed the jury that:

13 The defendant is accused of having committed the crime of
14 evading an officer with the willful disregard in Count 1.

15 The prosecution has introduced evidence for the purpose of
16 showing that there is more than one act upon which a conviction
17 on Count 1 may be based.

18 The defendant may be found guilty, if the proof shows beyond a
19 reasonable doubt that he committed any one or more of the acts.

20 However, in order to return a verdict of guilty to Count 1, all jurors
21 must agree that he committed the same act. It is not necessary that
22 the particular act agreed upon be stated in your verdict.

23 RT 332-333; CT 178. The jury was also instructed on the potential Vehicle Code violations
24 upon which the jury could base its verdict: violations of California Vehicle Code section 22350,
25 the basic speed law, and section 21460, which defines the circumstances in which a driver may
26 cross over a double yellow line in the middle of the road. RT 293-295; CT 171-172.

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On appeal, petitioner argued that the trial court was required to give a more specific unanimity instruction because the statute can be violated by driving with willful or wanton disregard, committing multiple traffic violations during the pursuit, or causing property damage.⁴ The Court of Appeal rejected this claim:

[D]efendant maintains that to the extent the rule [rejecting the need for a specific unanimity instruction when there are alternative ways in which an offense may be committed] prevails in California, it is inconsistent with . . . *Schad v. Arizona* (1991), 501 U.S. 624, 630-633 [115 L.Ed.2d. 555, 564-566], wherein the court held that due process precludes a state from punishing a criminal defendant under a statute so broadly defined that it is fundamentally unfair. However, the California Supreme Court has already thwarted such a claim. In *People v. Santamaria* (1994) 8 Cal.4th 903, 918-919, the court stated that California's version of the unanimity rule, requiring juror unanimity only on the issue of whether the defendant is guilty of the charged crime irrespective of whether there is agreement on which of several theories of guilt apply, "passes federal constitutional muster."

Lodg. Doc. D, App. A at 13-14.

In Schad v. Arizona, 501 U.S. 624, 629 (1991), a defendant was charged with first degree murder on two theories: that the murder was committed during the course of a robbery or that it was premeditated and deliberate. He contended that the jury should have been instructed

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⁴ In this case, however, the court did not instruct the jury that property damage could be the basis of the felony evading charge. RT 294; CT 171.

1 that it must unanimously agree on the theory of first degree murder supporting his conviction.

2 The Supreme Court rejected the claim:

3 Petitioner's jury was unanimous in deciding that the State had
4 proved what, under state law, it had to prove: that petitioner
5 murdered either with premeditation or in the course of committing
6 a robbery. The question still remains whether it was
7 constitutionally acceptable to permit the jurors to reach one verdict
8 based on any combination of the alternative findings. If it was,
9 then the jury was unanimous in reaching the verdict, and
10 petitioner's proposed unanimity rule would not help him. If it was
11 not, and the jurors may not combine findings of premeditated and
12 felony murder, then petitioner's conviction would fall even without
his proposed rule, because the instructions allowed for the
forbidden combination.

In other words, petitioner's real challenge is to Arizona's
characterization of first-degree murder as a single crime as to
which a verdict need not be limited to any one statutory alternative,
as against which he argues that premeditated murder and felony
murder are separate crimes as to which the jury must return
separate verdicts.

Id. at 630-31. The Court concluded that, under Arizona law, premeditation and the commission
of a felony in conjunction with the murder were means of satisfying the mens rea requirement
and ultimately found that permitting jurors to rely on both in reaching a unitary verdict did not
violate due process. Id. at 639. It cautioned, however,

[i]f . . . two mental states are supposed to be equivalent means to
satisfy the *mens rea* element of a single offense, they must
reasonably reflect notions of equivalent blameworthiness or
culpability, whereas a difference in their perceived degrees of
culpability would be a reason to conclude that they identified
different offenses altogether. Petitioner has made out no case for
such moral disparity in this instance.

Id. at 643. The Court also found there was substantial historical and statutory precedent for
equating the mental states of premeditated murder and felony murder. Id. at 640.

In this case, petitioner suggests there is no equivalent blameworthiness between
what he identifies as the mens rea requirements of wantonness and strict liability, based on
wanton driving itself or the commission of qualifying traffic offenses. Am. Pet. (Docket No. 20-

1 2) at 16.⁵ He has provided little analysis of the question, however, either by examining the
2 statutes themselves or other precedent to suggest the problems with the manner in which the
3 California legislature defined the offense. As the Schad court observed, in such a case, “the state
4 legislature’s definition of the elements of the offense is usually dispositive.” Id. at 639 (internal
5 citation, quotation omitted). In light of the general primacy of a state legislature’s definitions,
6 petitioner cannot show that the state court applied federal law unreasonably in rejecting this
7 claim of error.

8 IT IS THEREFORE RECOMMENDED that the petition for a writ of habeas
9 corpus be denied.

10 These findings and recommendations are submitted to the United States District
11 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty
12 days after being served with these findings and recommendations, any party may file written
13 objections with the court and serve a copy on all parties. Such a document should be captioned
14 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections
15 shall be served and filed within ten days after service of the objections. The parties are advised
16 that failure to file objections within the specified time may waive the right to appeal the District
17 Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

18 DATED: March 17, 2008.

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21 U.S. MAGISTRATE JUDGE
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⁵ Page references are to those assigned to the document by the court’s CM/ECF system.